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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,

vs.

WYMAN PARTRIDGE & COMPANY.

BRIEF FOR THE RESPONDENT.

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UNITED STATES OF AMERICA, PETITIONER,

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WYMAN PARTRIDGE & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the Court of Claims (Rec., p. 9) is reported in 41 F. (2d) 886.

JURISDICTION.

The judgment of the Court of Claims was entered June 2, 1930, (Rec., p. 17). The petition for writ of certiorari was filed September 2, 1930, (Rec., p. 21). This Court granted certiorari on October 20, 1930, (Rec., p. 18) 282 U. S. —. Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED.

The questions presented are:

1. Whether Section 611 of the Revenue Act of 1928, (U. S. C. Supp. III, Title 26, Section 2611) should be construed as an administrative provision applying only to the

Commissioner of Internal Revenue and not applying to suits in the Courts.

2. Whether Section 611 of the Revenue Act of 1928 is to be construed so as to deprive the respondent of its title and right to possession and enjoyment of the money illegally collected from it as a tax after the statutory period for collection had expired and after Section 1106 (a), (U. S. C. App., Title 26, Section 1249) of the Revenue Act of 1926 had completely extinguished the liability.

3. Whether Section 611 of the Revenue Act of 1928 is constitutional under the Fifth Amendment of the Constitution of the United States if it be construed as an attempt to deprive the respondent of the rights which accrued to it under Section 1106 (a) of the Revenue Act of 1926.

4. Whether Section 611 of the Revenue Act of 1928 should be construed as a withdrawal by the Government of its consent to be sued.

5. Whether the attempted repeal of Section 1106 (a) of the Revenue Act of 1926 by Section 612 of the Revenue Act of 1928, (U. S. C. Supp. III, Title 26, Section 2611) as of the date of its enactment can prevent the respondent from recovering in this action.

6. Whether Section 611 of the Revenue Act of 1928 should be construed as a recreation of a tax liability which had been completely extinguished by Section 1106 of the Revenue Act of 1926, which provided in part, "that the bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability."

STATUTES INVOLVED.

The statutes involved in this proceeding are as follows:

Section 1106 (a) of the Revenue Act of 1926, 44 Stat. 9, 113, provides:

> Sec. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar

the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statutes of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Section 607 of the Revenue Act of 1928, 45 Stat. 791, 874, provides:

> Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 611 of the Revenue Act of 1928, 45 Stat. 791, 875, provides:

> Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Section 612 of the Revenue Act of 1928, 45 Stat. 791, 875, provides:

> Sec. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT.—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

Section 1113 of the Revenue Act of 1926 provides as follows:

> Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall, within 90 days after any such disallowance, notify the taxpayer thereof by mail."
>
> (b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. App. Title 26, Sec. 156.)

Section 3226 of the Revised Statutes was not amended by the Revenue Act of 1928.

STATEMENT OF FACTS.

The Statement of Facts in the brief of the petitioner (pages 2 and 3) is a fair statement of the case. Suffice it is to say, that the year involved is the fiscal year ended November 30, 1918. (Rec., p. 8); that in May, 1924, an additional

assessment of income and excess profits taxes was made against the respondent by the Commissioner of Internal Revenue (Rec., p. 8); that the respondent did thereupon file a claim in abatement without bond (Rec., p. 8); that the statutory period for collection as extended by waivers expired on December 31, 1925, (Rec., p. 8); that Section 1106 (a) of the Revenue Act of 1926 became law on February 26, 1926; that on August 17, 1926, the respondent, under protest, paid an amount of $45,992.87, being a portion of the additional assessment made in May, 1924, (Rec., p. 8); that on July 18, 1927, respondent filed its claim for refund on the grounds that collection was improperly made after the statutory period for collection had expired (Rec., p. 8); that the claim was rejected on April 4, 1928, (Rec., p. 8) and suit was instituted on June 7, 1928, (Rec., p. 6).

SUMMARY OF ARGUMENT.

The respondent shall show that Section 611 of the Revenue Act of 1928 is merely a limitation upon Section 607 of the same act and that Section 607 was enacted to enlarge the power of the Commissioner of Internal Revenue in making refunds and credits of amounts collected as taxes after the statutory period for collection had expired, consequently, that section has no application to suits filed in the Courts for the recovery of amounts illegally collected. If this Court holds that Section 611 of the Revenue Act of 1928 applies to suits in the Courts, then the respondent shall show that by virtue of Section 1106 (a) of the Revenue Act of 1926 it acquired a vested property right which could not be affected by any subsequent legislation of Congress, and shall show further that Section 611 did not, and could not, recreate any tax liability that had been completely extinguished by Section 1106 (a) of the Revenue Act of 1926. The respondent shall show further that any attempt by Congress to recreate a liability which had been extinguished by Section 1106 (a) of the Revenue Act of 1926 is unconstitutional and void as a taking of property in violation of

the Fifth Amendment of the Constitution of the United States. The respondent shall also show that Section 611 of the Revenue Act of 1928 was not a withdrawal by the Government of its consent to be sued and that under the facts in this case if Section 611 is so construed then it would be repugnant to the Constitution.

ARGUMENT.

PRELIMINARY STATEMENT.

At the outset the respondent wishes to call the attention of this Court to a very important fact in this case which is not present in the case of Graham and Foster *vs.* Collector, now pending in this Court, No. 36, October Term, 1930. This important fact is that the collection of the amount in controversy was made from the respondent on August 17, 1926, while Section 1106 (a) of the Revenue Act of 1926 was in effect, which section provided that the bar of the statute of limitations against the United States shall not only bar the remedy but shall extinguish the liability. In the Graham and kindred cases pending before this Court collection was made prior to February 26, 1926, the date of the passage of the Revenue Act of 1926. The importance of this distinction can readily be seen when it is noted that the Court of Claims rendered judgment in favor of this respondent after that Court had already given judgment in favor of the Government in a number of cases where collection had been made prior to the passage of Section 1106 (a) of the Revenue Act of 1926. The respondent shall show that it is entitled to recover in this proceeding regardless of what the decision of this Court may be in the case of Graham and Foster *vs.* Collector.

I.

SECTIONS 607 AND 611 OF THE REVENUE ACT OF 1928 ARE ADMINISTRATIVE PROVISIONS APPLYING ONLY TO THE COMMISSIONER OF INTERNAL REVENUE AND DO NOT APPLY TO A CASE WHERE SUIT IS BROUGHT IN THE COURTS.

Section 1106 (a) of the Revenue Act of 1926 (C. 27, 44 Stat. 9, 113) provides in part as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

It will be noted that Section 1106 (a) prevents a "credit or refund" unless the taxpayer has overpaid the tax. Since the Commissioner of Internal Revenue is the only person authorized to make a "credit" or a "refund," it is quite apparent that the limitation against such credits or refunds in Section 1106 (a) had application to him alone. This conclusion is fully sustained by the final action taken in the case of Adelaide F. Chapman *vs.* United States, 63 Ct. Cls. 424, in which the Court of Claims construed Section 1106 (a) of the Revenue Act of 1926 as preventing the plaintiff in a suit from recovering barred taxes unless the taxpayer has actually overpaid the tax. Petition for certiorari was filed by the taxpayer and in a brief submitted on behalf of the United States, in which the Solicitor General agreed that the writ should issue, it was said:

> "After the decision in Bowers *vs.* New York and Albany Lighterage Company, supra, was handed down and it was disclosed that the Court of Claims was in error in holding that the claim of the United States had not been barred, and on March 31, 1927, the petitioner filed a motion for new trail, which was overruled October 24, 1927. Section 1106 (a) was

brought to the attention of the Court of Claims in connection with that motion, although the record does not disclose it, and the action of the Court of Claims in overruling the motion can only be explained on the theory that it held that Section 1106 (a) operated to prevent petitioner from obtaining a refund of the tax paid notwithstanding that when paid its collection was barred by the statute of limitations.

"The phrase 'but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax,' literally construed, may mean that where a tax has been paid which was barred by the statute of limitations when paid, refund shall nevertheless be denied unless the taxpayer has overpaid the tax in the sense of paying more than was justly due without regard to the statute of limitations.

"Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in Graham *vs.* Dupont, supra, or prevent distraint proceedings by injunction and may be compelled by the Collector to pay a tax, the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

The judgment of the Court of Claims was vacated and the case remanded to enter judgment for the taxpayer. October term, 1928, 49 S. Ct. p. 7; 278 U. S. 660. (See also Ellay Co. *vs.* Bowers, 25 F (2d), 637; certiorari denied 48 S. Ct. 601.)

The Commissioner of Internal Revenue also was of the opinion that Section 1106 (a) of the Revenue Act of 1926 merely limited his right to make refunds and credits of amounts collected after the statutory period for collection had expired and that it did not prevent recovery in the

courts. In I. T. 2382, C. B. VI-2-102, issued during the Fall of 1927, the Commissioner of Internal Revenue said:

> "Many inquiries are being received both from within and without the Bureau as to the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of Bowers *vs.* New York & Albany Lighterage Company. Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the New York & Albany Lighterage Company decision may have no application to cases where bonds were filed or where claims in abatement were filed, *and that, in view of Section 1106 of the Revenue Act of 1926, the decision should be limited to refunds resulting from court decisions and has no applications to refund by the Commissioner.* Furthermore, Section 1106 was not raised in the Albany Lighterage Company case and was not considered in connection with the confession of error made by the Government in the Toxaway Mills case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the Albany Lighterage Company decision to other cases in view of Section 1106.
>
> "In view of the great uncertainty as to the whole matter it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the Albany Lighterage Company decision unless and until the situation is clarified by further court decision or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

The above statement by the Commissioner of Internal Revenue was an invitation by the Commissioner to Congress to pass legislation to clarify his power in making refunds and credits in cases where sums had been collected after the statutory period for collection had expired. Congress anansweredthe invitation of the Commissioner of Internal

Revenue by enacting Sections 607 and 611 of the Revenue Act of 1928. By Section 607 Congress provided that any amount collected after the expiration of the period of limitation properly applicable thereto either before or after the passage of the Revenue Act of 1928 shall be considered an "overpayment" and shall be refunded to the taxpayer if claim therefor is properly filed. In other words, Section 607 merely removed the bar which Section 1106 (a) of the Revenue Act of 1926 had imposed upon the Commissioner and made it possible for him to make refunds and credits of amounts collected after the statutory period had expired, provided claim for refund was properly filed. This Section had no application to suits in Court since the Chapman case, supra, clearly shows that the authority of the Court to allow recovery had not been curtailed by Section 1106 (a) of the Revenue Act of 1926.

Section 611 of the Revenue Act of 1928 is merely a limitation on Section 607 and provides that in a case where an assessment was made prior to June 2, 1924, and if a claim in abatement was filed, and if the collection of any part of the tax was stayed, then the payment of such part was not to be considered an *overpayment under the provisions of Section 607*. But since Section 611 was merely a limitation upon Section 607 and as Section 607 had no reference to suits in Court it follows as a matter of course that Section 611 likewise had no reference to suits in Court. It was so held in Diamond Alkali Company *vs.* Heiner, 39 F. (2d) 643.

II.

UNDER THE PROVISIONS OF SECTION 1106 (a) OF THE REVENUE ACT OF 1926 WHICH PROVIDES THAT THE BAR OF THE STATUTE SHALL NOT ONLY BAR THE REMEDY BUT SHALL EXTINGUISH THE LIABILITY, THE RESPONDENT ACQUIRED A VESTED PROPERTY RIGHT.

Kent in his Commentaries, Vol. 4, page 202, defines a vested right as follows:

"A vested right is an immediate right of present

enjoyment, or a present, fixed right of future enjoyment."

In the case of Pearsall *vs.* Railway Company, 161 U. S. 646, this Court said:

> "Rights are said to be vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

In the case of Gladney *vs.* Syndor, 172 Mo. 318, the Court said:

> "Vested rights may be created either by the common law, *by statute*, or by contract, and it makes no difference as to the method of their creation, *they are entitled to the same protection.*" (Italics supplied.)

In Marshall *vs.* King, 24 Miss. 85, the Court defined a vested right "to be an immediate fixed right of present or future enjoyment."

Justice Chase in the case of Calder *vs.* Bull, 3 Dall. 386, 1 L. Ed. 648, when speaking of a vested right said:

> "When I say that a right is vested in a citizen, I mean that he has the power to do certain acts, or to possess certain things, according to the law of the land."

When we consider the above definitions there appears to be no doubt that when Section 1106 (a) of the Revenue Act of 1926 extinguished the liability of the respondent with respect to its tax liability for the fiscal year 1918, it acquired a vested right of present enjoyment in the realization that no further liability remained for that year and this realization was just as effectual as though the respondent had taken its money to the collector of Internal Revenue and removed the liability by a payment in cash. In the latter case the liability would have been removed by payment in cash while in the former case the liability was removed by operation of law. The result in either case would be exactly the same, namely, the extinguishment of the liability.

It seems fundamental that a taxpayer who paid his liability in cash thereby acquired a vested right not to be called upon again to satisfy the same liability. For the same reason the taxpayer whose liability was extinguished by operation of law acquired a vested right of present enjoyment in knowing that the liability that had been extinguished is forever gone.

Judge Green in the opinion below aptly set forth the effect of Section 1106 (a) of the Revenue Act of 1926 when he said:

> "The collector or commissioner, therefore, took money which was not owing to the United States and for that reason could not belong to it after it had been received. *After it had been paid it was still the rightful property of the taxpayer* . . .
>
> "It (Section 1106 (a) of the Revenue Act of 1926) had no application to what had been done prior to its enactment, but it warned the public officials that after it was enacted the exaction of a payment upon a tax as to which the statute of limitations had run was taking money from the taxpayer without any liability on its part existing, or, in short, a collection made where there was no debt." (Italics supplied.)

It is submitted, therefore, that by virtue of Section 1106 (a) of the Revenue Act of 1926 the respondent acquired a vested property right and that the collection of the amount involved in this action was a confiscation of property which rightfully belonged to the respondent. The respondent shall show that the vested right which it acquired by virtue of Section 1106 (a) of the Revenue Act of 1926 is fully protected under the Fifth Amendment of the Constitution of the United States and that this right could not be taken from it by any subsequent legislation.

III.

IF SECTION 611 OF THE REVENUE ACT OF 1928 BE CONSTRUED AS AN ATTEMPT TO DEPRIVE THE RESPONDENT OF ITS PROPERTY AND ITS VESTED RIGHT OF ACTION TO RECOVER, IT WOULD BE CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION.

If this Court determines that Congress intended by Section 611 of the Revenue Act of 1928 to deprive respondent of its property and also of its vested right of action of recovery, this Section would be violative of the Fifth Amendment, and void so far as respondent's case is concerned. The decisions of this Court sustain the respondent in this contention.

Mr. Justice Chase, in the case of Calder *vs.* Bull, supra, said:

> "There are acts which the Federal or State Legislatures can not do, without exceeding their authority, . . . as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I can not call it a law), contrary to the great first principles of the social compact, can not be considered a rightful exercise of legislative authority . . . or a law that takes property from A and gives it to B; it is against all reason and justice, for a people to intrust a Legislature with such powers; and therefore, it can not be presumed that they have done it."

To apply Section 611 to respondent's case, notwithstanding Section 715, the Separability Clause of the Revenue Act of 1928, would render that section unconstitutional.

Nichols *vs.* Coolidge, 274 U. S. 53; 52 A. L. R. 1081.

Blodgett *vs.* Holden, 275 U. S. 143.

Untermyer et al. *vs.* Anderson, Collector of Internal Revenue, 276 U. S. 440; 48 S. Ct. 353.

Justice demands that respondent be permitted to assert its legal and constitutional rights on reasonably equal terms with the petitioner before an impartial judicial tribunal.

Atchison, Topeka & Santa Fe Railway Company *vs.* O'Connor, 223 U. S. 280.

Christie-Street Commission Co. *vs.* United States, 136 Fed. 326, 69 C. C. A. 464.

Emery, Bird, Thayer Realty Co. *vs.* United States, 198 Fed. 242 (affirmed 237 U. S. 28).

Fidelity & Columbia Trust Co. *vs.* Lucas, 7 F. (2d), 146.

In the early case of Dartmouth College *vs.* Woodward, 4 Wheat, 518, this Court laid down the rule that where individuals have acquired absolute or vested rights under a statute a subsequent repeal can not divest these rights.

And in the case of Pritchard *vs.* Norton, 106 U. S. 132, this Court said:

> "A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the legislature to take it away."

A similar conclusion was reached by the Court in United States *vs.* Henrich, 12 Fed. (2d) 940, viz.:

> "My conclusion here is that Congress can not enact a law that would destroy, impair or injuriously affect rights that have vested under a former constitutional enactment, and that to enforce the Act of June 4, 1920, against the defendant and require him again to pay for his property would be in violation of the constitutional guarantee heretofore cited." (Fifth Amendment of the Constitution of the United States.)

In the case of Crump *vs.* Guyer, 157 Pac. 321; 2 A. L. R. 331, the Court reaches the same legal conclusion, and then said:

> "To hold otherwise would leave us at sea and place it in the power of the legislature at will to

> disturb, and even destroy by subsequent legislation rights which had accrued under existing laws."

By what right does the United States retain this illegally collected sum, or what statute creates and imposes any new liability upon this respondent, or precludes it from recovering back the illegally collected sum of money, or what law or statute of Congress could deprive respondent of its property and authorize the United States to keep and retain its property in violation of the Fifth Amendment of the Constitution? Certainly Section 611 did not confer such right and authority in the petitioner.

This Court in the case of Wm. Danzer and Company, Inc. *vs.* Gulf & Ship Island Railway Company, 268 U. S. 633, had occasion to pass upon a question closely related to the one found in the case of this respondent. The facts in that case show that in 1920, Congress passed the Transportation Act which contained a provision to the effect that the period of Federal control over railroads was not be computed as a part of the two year period of limitation for bringing action against carriers or for filing claims for reparation with the Interstate Commerce Commission for causes of action arising prior to Federal control. A claim for damages had been filed with the Interstate Commerce Commission against the railroad in question and an award was made by the Commission. The claim was not filed within two years from the date of the cause of action, however, if the period during which the Federal Government had control over the railroad were excluded, then the claim was filed in time. This Court held that the expiration of the two year period of limitations for filing the claim against the railroad not only barred the remedy but extinguished the liability and that the attempt of Congress by the Transportation Act of 1920 to modify the statutory period to recreate the liability after it had been extinguished was to deprive the carrier of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It appears that the attempt of Congress in passing Section

611 of the Revenue Act of 1928, either to recreate a liability which had been completely extinguished by operation of law or to retain the property of the respondent illegally taken, is subject to the same objection.

IV.

THE CASES CITED BY THE PETITIONER TO SHOW THAT CONGRESS HAS POWER TO ALTER AND AMEND A STATUTE PERTAINING TO THE REMEDY HAVE NO APPLICATION TO THE CASE OF THE RESPONDENT.

On page 17 of the petitioner's brief reference is made to the case of Beers *vs.* Arkansas, 20 How. 527, to support its contention that Congress has power to deprive the respondent of the rights acquired under Section 1106 (a) of the Revenue Act of 1926. The petitioner also refers to its brief in the case of Graham and Foster *vs.* Goodcell, No. 36, October Term, 1930, now pending in this Court, in which it cites the cases of Collector *vs.* Hubbard, 12 Wall. 1, and Rock Island, A. and L. R. Company *vs.* United States, 254 U. S. 141, in support of the same principle. The respondent shall show that none of these cases have any application to the principle involved in its case.

The Beers' case arose under a statute of the State of Arkansas permitting the State to be sued on State bonds. Under this statute a suit was brought upon State bonds and while the suit was in litigation the legislature passed another law requiring the bonds to be filed in Court or the suit to be dismissed. The suitor refused to file his bonds in Court and the suit was dismissed. The Supreme Court of Arkansas sustained the dismissal of the suit and the case was then carried to this Court. The question for determination was whether or not the original law authorizing suit without the filing of the bonds in Court was a contract which was impaired by the subsequent act of the legislature. This Court held that the original law was not a contract and that the provisions of the subsequent act requiring the

filing of the bonds in Court before the suit could be continued violated no constitutional rights of the suitor. Certainly this case has nothing to do with the case of the respondent. In the first place the question of a vested right was not involved and in the second place the subsequent act of the legislature of the State of Arkansas merely referred to the *remedy*. It prescribed certain conditions that had to be complied with before the Court acquired jurisdiction. The record in the case of this respondent clearly shows that it has complied with all of the conditions requisite to the jurisdiction of the Court. After it was required to pay the amount in controversy it filed its appeal with the Commissioner of Internal Revenue for refund and upon rejection of its claim it filed this suit in the Court within the two year period provided by law. The petitioner has never contended that the respondent did not comply with these conditions.

In order to show that the decision of this Court in the Beers case was limited to the one question referred to above, the following quotation is made from the case:

> "Nor has the State Court, in the judgment brought here for review, decided anything but the question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought *nor the obligations it created or the rights of parties under it.* It has decided merely, that it had no right under the law of the State to try this question unless the bonds given by the State are filed." (Italics supplied.)

It is clear that the case of Beers *vs.* Arkansas has no application to the case of this respondent.

Nor do the cases of Collector *vs.* Hubbard, supra, and Rock Island R. Company *vs.* United States, supra, apply to the case of the respondent. The Hubbard case arose under the Act of June 30, 1864, 13 Stat. at Large, 281, which laid what is known as an income tax. Hubbard protested payment of the tax under the Act and on August 19, 1865, he paid the tax under compulsion. Hubbard then brought

suit to recover the amount illegally collected and under the law in effect at that time it was not necessary to first appeal to the Collector or the Commissioner of Internal Revenue before suit could be brought. While the suit of Hubbard was pending in the Circuit Court, Congress, on July 13, 1866, passed an act which provided that no suit shall be instituted in any Court unless an appeal is first made to the Commissioner of Internal Revenue for a return of the amount illegally collected. The suit was called for trial in June, 1867, and on the basis of the admitted fact that no appeal had been made to the Commissioner, the Circuit Court dismissed the case. Hubbard then on August 9, 1867, sued the collector in indebitatus assumpsit in the State Court of Connecticut without first having appealed to the Commissioner of Internal Revenue. Hubbard contended that no such appeal was necessary in his case for the reason that he had acquired a vested right to bring the suit without appealing to the Commissioner of Internal Revenue. This Court held that Hubbard could not bring the suit without having first appealed to the Commissioner in view of the Act of July 13, 1866.

In the Rock Island case the claimant had filed an abatement claim against certain proposed taxes. The Commissioner of Internal Revenue rejected the abatement claim and required payment of the tax. The claimant then brought suit on the rejected claim without appealing to the Commissioner of Internal Revenue after payment of the tax. This Court held that the claimant had not complied with the conditions of the *remedy* and could not maintain its suit because it had not appealed to the Commissioner of Internal Revenue for a refund after payment of the tax.

The above cases clearly apply only to a compliance of the conditions of the *remedy*. As already pointed out the record in this case clearly shows that the respondent has complied with all of the conditions of the remedy. If it had failed to file its claim for refund within the proper time or if it had failed to lodge its suit in the Court within two

years of the time of the rejection of the claim for refund, it would not be before this Court prosecuting this action. The petitioner has confused *rights* with *remedies* and has cited law in support of the latter to sustain the former. As was said by this Court in Chelentis *vs.* Luckenback S. S. Company, 247 U. S. 384:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury."

And in the case of Ettor *vs.* Tacoma, 228 U. S. at pp. 155, 156 and 158, this Court said:

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or *deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority.* Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, *may take away an existing property right*, or impair the obligation of a contract. . . . The right to compensation was a vested property right." (Italics supplied.)

See also the case of Smallwood *vs.* Gallardo, 275 U. S. 56; 48 S. Ct. 23.

While, therefore, Congress has power to legislate with respect to the remedy, it can not legislate to defeat a vested property right which is something separate and distinct from a remedy. And in the Ettor case, supra, this Court said that a statute obstensibly affecting the remedy could not be sustained "if it deprives one of a vested property right."

Chief Justice Marshall in the case of Marbury *vs.* Madison, 1 Cranch, 137, said:

> "To take away all remedy for the enforcement of a right is to take away the right itself. But this is not within the power of the State."

It is submitted, therefore, on the basis of the decisions of this Court, supra, any attempt on the part of Congress by Sections 611 or 612 of the Revenue Act of 1928 to deprive the respondent of the rights which accrued to it under Section 1106 of the Revenue Act of 1926 is unconstitutional and void for the reason that it violates the Fifth Amendment.

V.

SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT WITHDRAW THE CONSENT OF THE UNITED STATES TO BE SUED BY THE RESPONDENT.

The petitioner contends that by Section 611 of the Revenue Act of 1928 Congress withdrew the consent of the United States to be sued by the respondent. It is not clear to the respondent upon what basis the petitioner supports its contention. The word "Court" does not appear in Section 611 and there is no statement in that section to the effect that the right of the respondent to sue has been curtailed. The jurisdiction of the Court of Claims to entertain the suit of the respondent was established by the so-called Tucker Act, passed in 1883, which became Section 145 of the Judicial Code and which now appears as Section 250 of Title 28 of the Code of Laws of the United States of America. The question of the jurisdiction of the Court of Claims in cases of this type is no longer in controversy. Dooley *vs.* United States, 182 U. S. 222; United States *vs.* Emery, Bird, Thayer Realty Company, 237 U. S. 28. The respondent acquired its right to bring the suit in connection with Section 3226 of the Revised Statutes as amended. Whenever Congress intended to change or modify

the provisions of Section 3226 of the Revised Statutes it specifically referred to that section and set forth the particulars in which it was amended, See Revenue Act of 1921, Chap. 136, Sec. 1318, 42 Stat. 315; Revenue Act of 1924, Chap. 234, Sec. 1014, 43 Stat. 343; Revenue Act of 1926, Chap. 27, Sec. 1113, 44 Stat. 9.

Certainly if Congress by any provision of the Revenue Act of 1928 intended to amend Section 3226, specific reference would have been made to that section in the Revenue Act of 1928. Sections 3220, 3228, and 3176 of the revised statutes were amended by the Revenue Act of 1928. See Section 619 of that act. It will be noted that specific reference is made to these sections of the revised statutes and amendments enacted in connection therewith. If Congress intended to amend Section 3226 it would have appeared specifically as an amendment in the Revenue Act of 1928.

Any Government "of the people, by the people, for the people," will afford its citizens a proper judicial tribunal wherein to fairly litigate wrongs committed by that Government against its citizens, and when that consent has become a matter of settled law, certainly the courts will not by implication determine such consent to have been withdrawn. Section 611 of the Revenue Act of 1928 is not only devoid of any clear language to show a withdrawal of the consent of the United States to be sued but on the other hand it clearly indicates an intent merely to apply to the powers of the Commissioner of Internal Revenue.

The Circuit Court of Appeals for the Eighth Circuit in the case of Christie-Street Commission Company *vs.* United States, 136 Fed. 326, announced the prevailing rule when that Court, speaking through Judge Sanborn, said:

> "The Acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its contro-

> versies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the king can do no wrong. *There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it.* There is no reason why a Government should not submit its controversies with its subjects to adjudication or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs as universally as individuals. The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view." (Italics supplied.)

This doctrine was reaffirmed in Emery, Bird, Thayer Realty Company *vs.* United States, supra.

In Marbury *vs.* Madison, supra, Chief Justice Marshall said:

> "The Government of the United States has been emphatically termed a Government of laws and not of men. It will certainly cease to deserve this high appellation *if the laws furnish no remedy for the violation of a vested legal right.*" (Italics supplied.)

Courts of justice have no jurisdiction to make exceptions to a statute, nor to add to the exceptions which the legislature has made, as this would be legislating. Where the language of an act is explicit, it is not for the court to change it by construction based upon some supposed legislative policy. It is not for the court to say that it shall be so construed as to embrace other cases because no good reason can be assigned why they were excluded from its provisions. If the meaning of the legislature is plain, it must be obyed.

> Vol. 4, Ency. of U. S. S. Ct. Reps., p. 228.
>
> United States et al. *vs.* Missouri Pac. R. Co., 49 S. Ct. 133; 278 U. S. 269.

The rule was tersely stated in United States *vs.* Hartwell, 6 Wall., 385, 396 (18 L. Ed. 830):

> "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

This is also the recognized rule of the English courts. In one of the English decisions Lord Denman said the court was bound to look to the language employed and construe it in its natural and obvious sense, even though that was to give the words of the act an effect probably never contemplated by those who obtained the act and very probably not intended by the Legislature which enacted it.

> The King *vs.* The Commissioners, 5 A. and E. 804, 816.
>
> See, also, United States *vs.* Lexington Mill Co., 232 U. S. 399, 34 S. Ct. 337, 58 L. Ed. 658, L. R. A. 1915B, 774.
>
> Caminetti *vs.* United States, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442; L. R. A. 1917F, 502 Ann. Cas. 1917B, 1168.

It is submitted that under the most liberal construction Section 611 of the Revenue Act of 1928 can not be construed to be a withdrawal by the Government of its consent to be sued.

Furthermore, the respondent contends that under the facts as found in this case, an act of Congress attempting to deprive the respondent from recovering its property would in itself offend the Constitution in that it would result in a taking of the property of the respondent without due process of law. Nor does this contention offend the general proposition that a Government can prescribe the conditions under which it may be sued. Congress has prescribed the conditions under which it may be sued in this case and as already stated the respondent has fully and completely complied with all of these conditions. The question then is: if the Government has given its consent to be sued and

certain vested rights have been acquired, the divesting of which would offend the Constitution, can Congress defeat the protection afforded by the Constitution by completely withdrawing all redress? If this question is answered in the affirmative then the supposed guarantees in our social compact become a hollow myth and the efforts of our eminent jurists who have developed our principles of constitutional law have been in vain.

In the case of Langford *vs.* United States, 101 U. S. 341, this Court said:

> "As applicable to the Government, or any of its officers, the maximum that the king can do no wrong has no place in our system of constitutional law."

And in the case of Brushaber *vs.* Union Paciffe R. Company, 240 U. S. at pp. 24-25, this Court, speaking through Chief Justice White, said:

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. (Citing authorities.)
>
> "And no change in the situation here would arise even if it be conceded, as we think it must be, *that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is a taking of the same in violation of the Fifth Amendment.*" (Italics supplied.)

Any statute of Congress which would attempt to permit the United States to retain property which rightfully belongs to the respondent on the sole basis that the respondent shall not have it, would, in the words of Chief Justice White be so

"arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is a taking of the same in violation of the Fifth Amendment."

Furthermore, in the case of Macallen Company *vs.* Commonwealth of Massachusetts, 279 U. S. 620; 49 S. Ct. 432, this Court said:

> "Constitutional provisions, either operating by way of grant or limitation are to be enforced according to their letter and spirit and can not be evaded by any legislation which seeks to accomplish indirectly that which can not be done directly."

It is submitted, therefore, that Section 611 of the Revenue Act of 1928 can not be construed as a withdrawal by the United States of its consent to be sued and furthermore, any such construction would cause the Section to offend the the Fifth Amendment of the Constitution.

VI.

SECTION 612 OF THE REVENUE ACT OF 1928 WHICH ATTEMPTS TO REPEAL SECTION 1106 (a) OF THE REVENUE ACT OF 1926 AS OF THE DATE OF ITS ENACTMENT HAS NO EFFECT ON THE RIGHT OF THE RESPONDENT TO RECOVER.

The petitioner at page 15 et seq. of its brief contends that any rights which accrued to the respondent under Section 1106 (a) of the Revenue Act of 1926 were divested by Section 612 of the Revenue Act of 1928, which attempts to repeal Section 1106 (a) as of the date of its enactment. The respondent will show that Section 611 had no such effect.

This Court, in the case of Memphis *vs.* United States, 97 U. S., p. 293, said:

> "We do not deny that it is competent for a legislature to repeal an act which when it was passed was a mere gratuity, *if while it was in existence no vested rights have been acquired under it or in virtue of it.*" (Italics supplied.)

In the case of County of McCracken *vs.* Mercantile Trust Company, 84 Ky. 314; 1 S. W. 585, the Court said:

> "A law can be repealed by the lawgiver but the rights which have been acquired while it was in force do not thereby cease. This was the rule of the civil law and has been strictly adhered to in England, where there is no express restriction upon legislative power."

This Court in the case of De Lima *vs.* Bidwell, 182 U. S., p. 199, speaking through Mr. Justice Brown said:

> "Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. In any event it should not be interpreted so as to make it retroactive."

To the same effect see the case of Lincoln *vs.* United States, 202 U. S., p. 485.

The above principle of law was also announced by Chief Justice Marshall in the case of Fletcher *vs.* Peck, 6 Cranch 133; 10 U. S. 75, when he said:

> "The principle asserted is that, one legislature is competent to repeal an act which a former legislature was competent to pass; and that one legislature can not abridge the powers of a succeeding legislature. The correctness of this principle so far as respects general legislation can never be controverted. *But if an act be done under a law, a succeeding legislature can not undo it. The past can not be recalled by the most obsolute power.*" (Italics supplied.)

And in the case of Frost *vs.* Corporation Commissioner, 278 U. S. 515; 49 S. Ct. 235, this Court, speaking through Mr. Justice Sutherland, referred to the case of Davis *vs.* Wallace, 257 U. S. 478, in which it was said:

> "An existing statute can not be recalled or restricted by anything short of a constitutional enactment."

The petitioner in its brief calls attention to the fact that the action in this case was not filed in the Court until after the Revenue Act of 1928 was passed. The record shows that the claim for refund was filed with the Commissioner of Internal Revenue prior to the passage of the Revenue Act of 1928. The petitioner in its brief advances no argument with respect to this question of fact. Nor could it, for as already pointed out, the repeal of Section 612 could not affect the rights of the respondent and furthermore in the case of Crump *vs.* Guyer, supra, at page 336, the Court said:

> "A failure to exercise a vested right before the passage of a subsequent statute which seeks to divest it in no wise affects or lessens that right." (Citing many cases.)

It seems clear that Section 612 of the Revenue Act of 1928 which attempted to repeal Section 1106 (a) of the Revenue Act of 1926 as of the date of its enactment had no effect on the rights of the repondent.

VII.

SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT RECREATE ANY LIABILITY THAT HAD BEEN EXTINGUISHED BY SECTION 1106 (a) OF THE REVENUE ACT OF 1926.

The concurring opinion below advanced a separate and distinct reason why the respondent should recover in this action. This opinion made it unnecessary to determine the constitutional law question but it concluded that the respondent was entitled to recover for the reason that the repeal of Section 1106 (a) of the Revenue Act of 1926 by Section 612 did not recreate the liability extinguished by the former section. In the view of the case taken in the concurring opinion the conclusion reached is undoubtedly correct. In the case of McCulloch *vs.* Maryland, 4 Wheat. 316, Chief Justice Marshall said that "the power to tax

involves the power to destroy." Certainly no such potent power will be imposed by implication. As said in the concurring opinion below:

> "Taxes are not imposed by implication and we may not hold that a liability for a tax once imposed, but extinguished, is revived or reimposed by a retroactive repeal of the statute which extinguished the liability. . . .
>
> "No language can be found in any of the provisions of the Revenue Act of 1928 reimposing the tax or recreating the liability therefor which had been extinguished by Section 1106 (a) of the 1926 Act."

In the very recent case of Crooks *vs.* Harrelson et al., No. 24, October Term, 1930, decided by this Court on November 24, 1930, Justice Sutherland announced the following rule:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In United States *vs.* Merriam, 263 U. S. 179, 187-188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in Partington *vs.* Attorney-General, L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law, the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'"

When we adhere with strictness to the letter of the law it is quite apparent that nothing in Section 611 and Section 612 of the Revenue Act of 1928 recreated any liability that

had been extinguished by Section 1106 (a) of the Revenue Act of 1926.

VIII.

THE LEGAL PRINCIPLES ESTABLISHED BY THE CASES OF UNITED STATES vs. HEINSZEN, 206 U. S. 370; RAFFERTY vs. SMITH, BELL & COMPANY, 257 U. S. 226, AND CAMPBELL vs. HOLT, 115 U. S. 620, DO NOT APPLY TO THE CASE OF THIS RESPONDENT.

The petitioner in its brief stresses the above cases to sustain its position that Congress by the Revenue Act of 1928 had authority to reimpose the liability which had been extinguished by Section 1106(a) of the Revenue Act of 1926. It is submitted that the principles announced in the above cases have no application to the case of this respondent. The cases of United States *vs.* Heinszen and Rafferty *vs.* Smith, Bell & Company merely raised the question of the right of Congress to pass an act legalizing and ratifying the imposition and collection of duties by the authorities of the United States in the Philippine Islands prior to the passage of the act. The only question of constitutional law involved in this issue was whether or not Congress could pass a law imposing a tax or a duty retroactively. There is no doubt but that Congress has such power. However, the application of Section 611 of the Revenue Act of 1928, if it be held to be an attempt to deprive this respondent from recovering, presents an entirely different question of constitutional law. The Act under consideration in the Heinszen and Rafferty cases created an original liability retroactively. On the basis of the argument of the Government, Section 611 of the Revenue Act of 1928 did not result in the creation of an original liability but would be an attempt to recreate a liability that had been created by a prior revenue act, which liability had been completely extinguished by Section 1106(a) of the Revenue Act of 1926.

The year involved in this action is the fiscal year ended November 30, 1918. The Revenue Act of 1918 was passed

on February 24, 1919, and was made to apply retroactively to the year 1918. The respondent has raised no complaint about the Revenue Act of 1918 on the basis that it applied retroactively to include income accrued in the year 1918. If it had, the petitioner would have a complete answer by citing the Heinszen and Rafferty cases. However, it is submitted that this is the fullest extent to which the law in these cases can be applied.

This distinction is clearly shown by this Court in the case of Forbes Boat Line *vs.* Commissioner, 258 U. S. 338, 339. Speaking through Justice Holmes the Court said:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of United States *vs.* Heinszen & Co., 206 U. S. 370; (Rafferty *vs.* Smith, Bell & Company, 257 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. Wagner *vs.* Baltimore, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."

The case of Campbell *vs.* Holt, supra, involved the breach of a common law liability on a contract. This Court held that the expiration of the bar of limitations applied to the remedy only and did not extinguish the liability. Consequently, subsequent legislation affecting the *remedy* did not deprive the cititizen of his property without due process of law. It is quite apparent that the principle in the case of Campbell *vs.* Holt does not apply to the case of this respondent for the reason that its liability had been completely extinguished by Section 1106(a) of the Revenue

Act of 1926. The Court recognized the distinction in the case of Eberhart *vs.* United States, 204 Fed. 890, when it said:

> "They (statutes of time limitation that not only bar the remedy but extinguish the liability) are excepted from the rule announced in Campbell *vs.* Holt, 115 U. S. 628; 6 Sup. Ct. 209; 21 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the legislature may not overthrow at pleasure by extending the time for collecting it."

As far as the respondent can find no case in which the facts are similar to those in its case have been decided in favor of the Government. In fact, there does not appear to have been a dissenting opinion in any case. Decisions have been rendered against the Government on similar facts in the following cases:

Pepsin Syrup Co. *vs.* Schwaner, 35 F. (2d) 197 (S. D. Ill.).

Clinton Iron & Steel Co. *vs.* Heniner 30 F. (2d) 542 (W. D. Pa.).

Erie Coal & Coke Co. *vs.* Heiner, 33 F. (2d) 135, (W. D. Pa.).

Diamond Alkali Co. *vs.* Heiner 39 F. (2d) 643 (W. D. Pa.).

Dobbins *vs.* Comm. 31 F. (2d) 935.

Heiner *vs.* Erie Coal & Coke Co. 42 F. (2d) 214 (C. C. A. 3rd).

Wettengel *vs.* Robinson, 289 Pa. 525; 136 Atl. 673 (Sup. Ct. Penna.).

Southern Lumber Co. *vs.* U. S. (W. D. Ark.) not yet reported. See Commerce Clearing House Tax Service 1930, Vol. 3, page 8962.

The respondent particularly wishes to call the attention of this Court to the Wettengel decision by the Supreme Court of Pennsylvania in which that Court in a well-reasoned opinion held that the provisions of the Revene Act of 1928

had no effect upon the liability that had been extinguished by Section 1106(a) of the Revenue Act of 1926. The Court clearly distinguished the rule found in the case of Campbell *vs.* Holt.

CONCLUSION.

In conclusion the respondent contends that upon the law as developed by this and other Courts the judgment of the Court of Claims in its case should be sustained.

Respectfully submitted,

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